M. KANAGASUNDARAM

v.

PUBLIC PROSECUTOR

HIGH COURT, SINGAPORE
YONG PUNG HOW CJ
[CRIMINAL APPEAL NO. 11 OF 1991]
30 NOVEMBER 1991

CRIMINAL PROCEDURE: *Appeal against sentence - 1 charge of rape and 2 charges of carnal intercourse - Imprisonment for first and third charges to run consecutively - 22 years imprisonment and 24 strokes of the cane - Whether sentence excessive - Whether one transaction - Sentences should be concurrent or consecutive.*

The appellant was charged and convicted for rape with hurt under s. 376(2) Penal Code and having carnal intercourse against the order of nature under s. 377 of the Code. The charges arose out of events that occurred over the course of two hours on 4 January 1989. He was sentenced to 14 years imprisonment and 24 strokes of the cane for the first charge and to 6 years imprisonment and 8 years imprisonment on the second and third charges respectively. Convictions for the first and third charges to run consecutively. No backdating was ordered and the terms were to run from the date of sentence. He was thus sentenced to a total of 22 years in prison and 24 strokes of the cane. He appealed against the sentence on the grounds that it was excessive.

Held:

[1] As the offences took place in a short space of time and were against the same victim, at common law the sentencing principal commonly known as the one transaction rule would be likely to apply and the sentences for these offences should be concurrent rather than consecutive.

[2] The applicability of the principal of one transaction rule in Singapore is qualified by s. 18 of the Criminal Procedure Code. In this case s. 18 clearly covered the circumstances of this case as the three charges related to distinct sexual acts punishable under the written law.

[3] However the direction contained in s. 18 is limited. The direction only requires that at least two of the sentences imposed must run consecutively. The legislature has chosen to remain silent as to which of the sentences should run consecutively. The sentencing Court when exercising its discretion ought to have regard to the common law principle of sentencing applicable to the imposition of consecutive sentences, namely, the one transaction rule and the totality principle.

[Appeal dismissed.]

Cases referred to:

R v. Hussain [1962] Crim LR 712 ***(cit)***
R v. Fahlkner [1972] 56 Cr App R 594 ***(cons)***
R v. Wheatley [1983] 5 Cr App R (S) 417 ***(cons)***
R v. Skinner [1986] 8 Cr App R (S) 166 ***(cons)***
PP v. Teo Heng Chye [1989] 3 MLJ 205 ***(cons)***
PP v. Chot Saik Kam [1991] 1 MLJ 193 ***(cons)***
PP v. Philip Wong Kai Chuen [1991] 1 MLJ 321 ***(cit)***

Legislation referred to:
Criminal Procedure Code [Sing], s. 18
Penal Code [Sing], s. 71

Other source referred to:
Principles of Sentencing, by DA Thomas, 2nd Edn., pp. 57-58

JUDGMENT

Yong Pung How CJ:

The appellant pleaded guilty in the High Court to a charge of rape with hurt under s. 376(2) of the Penal Code and to two charges of voluntarily having carnal intercourse against the order of nature under s. 377 E of the Code. One of the s. 377 charges concerned fellatio while the other concerned anal intercourse. The victim in all three charges was the same person. Lao Kew Chad J sentenced the appellant to 14 years' imprisonment and 24 strokes of the cane on the first charge and to 6 years' imprisonment and 8 years' imprisonment on the second and third charges respectively, with the imprisonment for the convictions on the first and third charges to run consecutively. No backdating was ordered and the terms were to run from the date of sentence i.e. 31 May 1991. The appellant was thus sentenced to a total of 22 years in prison and 24 strokes of the cane. He appealed against the sentence on the ground that it was excessive. At the end of the hearing, we dismissed the appeal for the reasons which follow below.

The charges arose out of events that occurred over the course of two hours on 4 January 1989 in a toilet of a junior college. The victim, who was 17 years old at the time and a student in the junior college, had gone to the toilet and had entered a cubicle to change from her sports attire to her college uniform. Shortly after she entered and shut the cubicle door behind her, she heard a knock on the door, and thinking that it was one of her friends, she opened it. Instead, it was the appellant; he pushed his way in and locked the door. When she started to scream, he held her throat tightly with one hand and threatened her with the knife he held in his other hand. He warned her that he would kill her if she screamed, and he also used vulgar words on her and hit her continuously. The appellant then subjected the victim to various sexual acts. It is sufficient to recite that she was repeatedly raped and subjected to fellatio and anal intercourse. Throughout her ordeal, the victim was put in constant fear of being stabbed by the appellant.

After more than an hour, some of the victim's friends came into the toilet to look for her. One of them climbed over the cubicle partition wall, and raised an alarm. The appellant opened the cubicle door, ran out holding his knife, and successfully made his getaway.

The appellant was arrested by the police on 14 January 1989 and charged two days later. On 31 May 1991, he was brought before the High Court where he pleaded guilty and was sentenced as stated above.

In considering the appeal, our first concern was whether the sentences in this case should run concurrently or consecutively as the offences took place in a short space of time and were against the same victim. At common law, this would be a situation where the sentencing principle commonly known as the one transaction rule would be likely to apply. The rule may be stated shortly: where two or more offences are committed in the course of a single transaction, all sentences in respect of these offences should be concurrent rather than consecutive. The difficulty, of course, is with the question of what constitutes one transaction and this question is necessarily one of fact depending on all the circumstances of the case. In *R v. Hussain* [1962] Crimp LR 712, Hussain arrived at London airport in possession of

three tins containing Indian hemp for which he did not have a licence. He was convicted of both unloading prohibited goods from an aircraft and possessing a dangerous drug without a licence, and sentenced to consecutive terms of imprisonment. On appeal, the English Court of Criminal Appeal ordered the terms to run concurrently, although they also varied the terms so that the total period of imprisonment remained the same.

The general rule, however, is not an absolute rule. The English Courts have recognised that there are situations where consecutive sentences are necessary to discourage the type of criminal conduct being punished: see *R v. Faulkner* [1972] 56 Cr App R 594, *R v. Wheatley* [1983] 5 Cr App R s. 417 and *R v. Skinner* [1986] 8 Cr App R s. 166. The applicability of the exception is said to depend on the facts of the case and the circumstances of the offence. It is stated in broad and general terms and although it may be criticised as vague, it is necessarily in such terms in order that the sentencer may impose an appropriate sentence in each particular case upon each particular offender at the particular time the case is heard.

The applicability of the principle of the one transaction rule in Singapore is qualified by s. 18 of the Criminal Procedure Code (Cap 68) (the CPC) in cases where an accused is convicted and sentenced to imprisonment for more than two distinct offences. The section provides:

> Where at one trial a person is convicted and sentenced to imprisonment for at least 3 distinct offences, the Court before which he is convicted shall order that the sentences for at least two of those sentences shall run consecutively.

While it may one day be necessary to identify the scope of the phrase "distinct offences, we were of the opinion that the phrase clearly covered the circumstances of this case, as the three charges related to distinct sexual acts punishable under the written law. Accordingly, this was a case to which s. 18 applies.

The sentencing direction given to the Courts by virtue of s. 18 is governed by the use of the verb "shall" and, as there is nothing in the context of the section to suggest that the prima facie effect of the use of that verb can be departed from, we were of the view that the direction is a mandatory one. We were supported in our view by the consideration that it is only if it operates as a mandatory direction that effect can be given to the clear legislative intention, implicit in the wording of the section, that offenders convicted of multiple offences at one trial ought to be more severely punished than offenders convicted of less than three distinct offences.

It should be observed, however, that the direction contained in s. 18 is limited. The direction only requires that, at least two of the sentences imposed must run consecutively. The legislature has chosen to remain silent as to which of the sentences should run consecutively, and the sentencing Court has been left with a discretion on this question. In our view, the sentencing Court, when exercising its discretion, ought to have regard to the common law principles of sentencing applicable to the imposition of consecutive sentences, namely, the one transaction rule and the totality principle.

In this appeal, we considered first the question of whether all three terms of imprisonment should be made to run consecutively. The one transaction rule has been considered above, and, as stated, the facts of this case were clearly within the ambit of the notion of "one transaction". Although the offences in this case were despicable, and have become commonplace, we were not inclined to disturb the order of the learned Judge that the term of imprisonment for the second charge run concurrently with the other two terms as we were of the view that two consecutive terms was appropriate punishment in this case.

We now turn to the question of whether the learned Judge was right to combine the sentence on the first charge with the sentence on the third charge rather than order any other combination. When considering such a question, a sentencing Court ought to have regard to the totality principle which requires the Court to review the sentence and consider whether the aggregate is just and appropriate. The duty of the sentencer in this regard is to ensure that the sentence is not excessive.

We had to consider therefore if the order that the terms imposed for the first and third charges run consecutively was contrary to the stated principle. The High Court has stated the applicable test as being the broad question of whether the sentence is too much: *PP v. Teo Heng Chye* [1989] 3 MLJ 205; *PP v. Chot Saik Kam* [1991] 1 MLJ 193. Useful as the broad approach may be, we were of the opinion that it should, in appropriate circumstances, be further analysed. In this respect, we support the view of D A Thomas in *Principles of Sentencing* (2nd Edn.) that the principle has two limbs. The learned author stated (at pp. 57-58):

> The many decisions of the Court in which the totality principle has been applied to explain the reduction of a cumulative sentence made up of correctly calculated individual parts suggest that the principle has two limbs. A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of sentences for the most serious of the individual offences involved, or if its effect is to impose on the offender "a crushing sentence" not in keeping with his records and prospects.

The above passage has received the approval of the High Court of Singapore in *Philip Wong Kai Chuen v. PP* [1991] 1 MLJ 321. However, the first limb of the principle needs to be qualified in its application in Singapore where s. 18 of the CPC is applicable. The following hypothetical example illustrates this: a public servant is convicted at one trial of four distinct charges of criminal breach of trust and is sentenced to six years' imprisonment on each charge. Section 18 requires the sentencing Court to make at least two of the four terms run consecutively. This means that the offender will serve at least 12 years yet the statutory limit of 10 years imposed by s. 409 of the Penal Code means that the first limb of the totality principle is breached. To give full effect to the totality principle in such circumstances would be to frustrate the purpose of s. 18 and, accordingly, the first limb of A the principle has to be qualified. We note that the English Courts have also departed from the full effect of the first limb of the principle in appropriate cases even though they are not bound by any equivalent of s. 18 of our CPC: see *Thomas* (op cit at p. 59 and the cases cited at footnote 1).

We then considered the question as to which of the terms should run consecutively in this case in the light of the above observations. The appellant in this appeal had a previous conviction for rape. The offence was committed in 1985 and he was convicted on 1 December 1987 in the district Court and sentenced 6 years' imprisonment and 6 strokes of the cane. He appealed successfully to the High Court against the sentence of imprisonment and had it reduced to 4 years. He was released from prison in August 1988. For the purpose of sentencing in this case, the accused also had 2 other charges of voluntarily having carnal intercourse against the order of nature taken into consideration. These offences took place on 26 December 1988, i.e. shortly before the offences in this case.

On the facts of this case, there were no special mitigating circumstances. The appellant's plea in mitigation was that he was ashamed that he had committed the offences and that he did them out of passion. He said that he wanted to seek medical treatment (of an unspecified nature) to prevent any reoccurrence of such offences. He also said that he had been in remand since 14 January 1989, the date of his arrest.

In sentencing the appellant, Lai J stated that he had considered the appellant's plea in mitigation but was of the view that the circumstances of the offence and the appellant's other offences required that society be protected from him. We were of the view that the learned Judge could not be said to have been in error in his decision, after taking these matters into consideration, in making the sentence on the first charge run consecutively with the sentence on the third charge, rather than ordering any other combination of the terms. Although the total term achieved by this combination was 22 years, which was in excess of the 20 year maximum term presented by s. 376(2) for the charge of aggravated rape, the most serious charge, this could not be said to be wrong in principle in view of what we have said above of the relation between s. 18 of the CPC and the totality principle. In view of the appellant's antecedents, the charges of sodomy that were taken into consideration, and the nature and circumstances of the offences, it also could not be said that the sentence was a crushing one not in keeping with his record and prospects. We therefore did not disturb the order that the terms imposed for the first and the third sentences run consecutively.

It remained for us to consider if the individual terms imposed for each charge were excessive. In view of the appellant's antecedents, the charges of sodomy that were taken into consideration, and the nature and circumstances of the offence, we were of the view that the individual terms were not excessive. For the same reasons, we were of the view that the combined term did not offend the totality principle. It was our unanimous opinion that the appellant was a person who should be kept in prison for as long as possible and we accordingly dismissed his appeal.

Before we conclude, we wish to refer to the decision of the High Court in *PP v. Rajendra Prasad* (unreported, Criminal Case 18 of 1989). The accused in that case was charged with and convicted of two counts of rape and one count of robbery. The victim in all three charges was the same female and all three charges arose out of the same incident. The accused had raped the victim twice in 15 minutes and then robbed her. The Court sentenced the accused to 10 years' imprisonment and 12 strokes of the cane on the first charge but did not pass any sentence on the second charge as it was of the view that the second charge came under the purview of s. 71 of the Penal Code. The Court sentenced the accused to two years' imprisonment and six strokes of the cane on the third charge of robbery and ordered that the sentence of imprisonment run concurrently with that on the first charge. It did not order the sentence to run consecutively with that of the first charge because the High Court was of the view that s. 18 of the CPC did not apply to offences falling within the purview of s. 71 of the Penal Code.

The High Court view in that case that the second charge of rape came within the purview of s. 71 of the Penal Code is difficult to follow. The section reads:

> (1) Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided.
> (2) Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or where several acts of which one or more than one would by itself or themselves constitute an offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences.

We do not think that the section applies to two distinct acts of rape.

The High Court's decision in Rajendra Prasad went on appeal to the Court of Criminal Appeal, but the point on the absence of a sentence on the second charge was not taken: [1991] 2 MLJ 1. Accordingly, this Court has not given its approval to the approach taken by the High Court in that case, and we are of the opinion that that approach should not be followed in subsequent cases.

Also found at [1992] 1 CLJ 546